Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-003820-21T4

WAWA, INC.,

Plaintiff-Appellant,

—against—

STARR SURPLUS LINES INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; CRUM & FORSTER SPECIALTY INSURANCE COMPANY; EVEREST INDEMNITY INSURANCE COMPANY; BEAZLEY SYNDICATES AFB FOR AND ON BEHALF OF LLOYDS'S UNDERWRITER SYNDICATE NO. 2633 AFB, LONDON, ENGLAND AND LLOYD'S UNDERWRITER SYNDICATE NO. 0623 AFB, LONDON, ENGLAND, HISCOX SYNDICATES FOR AND ON BEHALF OF LLOYD'S UNDERWRITER SYNDICATE NO. 0033 HIS, LONDON ENGLAND; XL CATLIN FOR AND ON BEHALF OF XL CATLIN INSURANCE COMPANY UK LIMITED, LIRMA C7509; CONVEX INSURANCE UK LIMITED (& AFFILIATE CONVEX RE LTD) FOR AND ON BEHALF OF CONVEX INSURANCE UK LIMITED, LIRMA C9800; NEON UNDERWRITING LIMITED FOR AND ON BEHALF OF LLOYD'S UNDERWRITER SYNDICATE NO. 2468 NEO, LONDON, ENGLAND; ANTARES SYNDICATE FOR AND ON BEHALF OF LLOYD'S UNDERWRITER SYNDICATE NO. 1274 AUL, LONDON ENGLAND,

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY

DOCKET NO. CAM-L-000688-21

SAT BELOW:
HON. STEVEN J. POLANSKY
P.J.CV.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF THE PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST REGARDING AMICUS CURIAE

United Policyholders ("UP") is a highly respected national nonprofit 501(c)(3) organization. Founded in 1991, UP has operated for more than 40 years as a dedicated advocate and information resource for individual and commercial insurance consumers in the United States. UP assists purchasers of insurance who are seeking insurance or pursuing a claim for loss reimbursement. UP is routinely called upon to help policyholders in the wake of large-scale national disasters such as floods, windstorms, and other catastrophic loss events. For instance, with grant funding from the Hurricane Sandy New Jersey Relief Fund, UP provided three years of services to Garden State homeowners whose properties had been damaged or destroyed and needed insurance guidance. In that role, UP worked with regulators, including the New Jersey Division of Banking and Insurance, on matters related to policy sales and claims and consumer rights. Since March 2020, UP has been engaged in the critical effort to assist business owners around the country whose operations have been impacted by COVID-19 and public safety orders. In addition, UP is presenting analysis and commentary to courts and regulators on the special rules of contract construction that are unique to insurance; and

on the insurance industry's own historical interpretations of the standard-form insurance policy terms[3] it drafts (often called "drafting history").[4]

The interpretation and application of insurance contracts require special judicial handling. Commerce, government, and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management, and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and regulations, yet most insurers operate in multiple states. Most insurers serve three different masters when carrying out their important purpose, and the conflicts that arise often compel judicial balancing, such as the instant case. Insurers must meet their its own revenue objectives *and* the reasonable expectations of policyholders *and* the demands of their investors and shareholders. Judicial oversight is essential to

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[3] The Restatement of the Law, Liability Insurance defines "standard-form term" as "a term that appears in, or is taken from, an insurance policy form (including an endorsement) that an insurer makes available for a non-predetermined number of transactions in the insurance market." American Law Institute, Restatement of the Law, Liability Insurance § 1(13) (2019 updated 2022) ("Restatement").

[4] For a discussion of drafting history, see NAV-ITS, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110 (2005); Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am., 134 N.J. 1, 33-35 (1993).

maintain the purpose and value of insurance purchases by individuals and businesses in this complex system.

Insurers of course, draft-standardized insurance policy terms and imposes them without negotiation of substantive terms on insureds.[5] The phrase "physical loss or damage," which appears identically in each policy at issue here, is a quintessential example of such standardized wording. Given the boilerplate nature of this language, it is not controversial to say that at no time did Wawa – or, in the absence of proof to the contrary, any other policyholder – have input into this language. Nor has the insurance industry varied this standard-form language over the span of some 60 years, despite scores of pre-pandemic judicial interpretations finding that language in the same and similar iterations to be unclear, confusing, or outright ambiguous. See infra Section I.A. & II. Compounding challenges faced by insurance

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[5] According to the Restatement:

> A term contained in an insurance policy form approved for use by an insurance regulatory authority for any insurer is a standard-form term, unless the circumstances clearly indicate the contrary. Similarly, a term that is a standard-form term in one insurance policy is a standard-form term in another policy. An insurance policy term created by an insurance broker or other entity may become a standard-form term through such sufficiently regular use in the market that the term is treated by market participants as one of the standard options available for use in the market. A term does not have to be contained in the forms of multiple insurers for it to be a standard-form term.

Restatement § 1, cmt. i.

regulators are data mining, artificial intelligence, and computerized risk modeling which sometimes make it difficult if not impossible to give every new policy form or term the scrutiny it deserves.

Effectuating indemnification in cases of loss despite these factors remains a fundamental economic and social objective that courts can advance.[6] UP respectfully seeks to assist this Court in fulfilling these important roles.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and, in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners ("NAIC") since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations, collaboration, and development of model laws and regulations.

UP gave three separate NAIC presentations in 2020 on the topic of insurance coverage and claims for business interruption related to COVID-19

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[6] The Restatement defines the "objectives" of insurance to include "effecting the dominant protective purpose of insurance . . . ." Restatement § 2, cmt. c.

and public-safety orders.[7] UP presented evidence that insurers were not fully candid with regulators about the significance of boilerplate virus and pandemic-related limitations and exclusions they added to their policies.[8] Although insurers had paid business-interruption losses from hotel-reservation and event cancellations due to SARS, when they added limitations and exclusions after that event, some insurers told regulators, incorrectly, that they had *never* paid virus-related losses; and that therefore no rate decrease associated with the policy language change was appropriate. Insurers as a result, did not decrease rates, but also gave no clear notice to policyholders that virus- and pandemic-related losses could be excluded. Commercial policyholders therefore were not aware until the pandemic arose in 2020 of

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7 See NAIC Special Session One: COVID-19: Lessons Learned (Aug. 10, 2020), https://www.youtube.com/watch?v=J2QmaZqd9Vk&feature=youtu.be, and https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf (speakers' biographies); Amy Bach, Co-Founder & Exec. Dir., UP, Business Interruption Policies and Claims, Presentation at NAIC Summer Nat'l Mtg. of Prop. & Cas. Ins. Comm. (Aug. 12, 2020), https://uphelp.org/wp-content/uploads/2021/01/up_business_interruption_policies_and_claims.pdf; Amy Bach, Co-Founder & Exec. Dir., UP, COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, NAIC Summer Nat'l Mtg. of Consumer Liaison Comm. (Aug. 14, 2020), https://uphelp.org/wp-content/uploads/2021/01/8-14-20_bach_consumer_liaison_3_1.pdf.

8 Richard P. Lewis, John N. Ellison, & Luke E. Debevec, Here We Go Again: Virus Exclusion for COVID-19 and Insurers, NU PropertyCasualty360, Apr. 7, 2020, https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/.

insurers efforts to reduce, drastically, business-interruption loss protection. Because policyholders had no notice of this potentially very substantial hole in their insurance, they had no opportunity to cure the gap, hence the need for special judicial handling and careful scrutiny of this case.

Since 1991, UP has filed amicus curiae briefs in federal and state appellate courts across the country. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court.[9]

By submitting a brief in this matter, UP seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that escaped consideration. This is an appropriate role for an amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad[] implications of various possible rulings."[10]

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[9] See, e.g., Humana Inc. v. Forsyth, 525 U.S. 299, 314 (1999); Cont'l Ins. Co. v. Honeywell Int'l, Inc., 234 N.J. 23, 64 (2018); Allstate Prop. & Cas. Ins. Co. v. Wolfe, 105 A.3d 1181, 1185-86 (Pa. 2014); Julian v. Hartford Underwriters Ins. Co., 35 Cal. 4th 747, 760-61 (2005); Sproull v. State Farm Fire & Cas. Co., 184 N.E.3d 203, 220-21 (Ill. 2021); Nat'l Indem. Co. v. State, 499 P.3d 516, 543 (Mont. 2021).

[10] Robert L. Stern, Eugene Greggman, & Stephen M. Shapiro, Supreme Court Practice: For Practice in the Supreme Court of the United States 570-71 (1986) (quoting Bruce J. Ennis, Effective Amicus Briefs, 33 Cath. U. L. Rev. 603, 608 (1984)).

PRELIMINARY STATEMENT

The ruling sought by the insurers here will curtail coverage for thousands and thousands of New Jersey policyholders. UP respectfully submits this Court should reverse and remand the trial court's order dismissing the First Amended Complaint because:

First, historically, insurers have conceded that, when the condition of property changes from usable for an insured purpose to unusable for *that* purpose, whether due to the presence of fumes, overhanging rocks, odors, or the outright theft or disappearance of the property, the resulting inability to use the property, satisfies "physical loss or damage." It is only now, that insurers have contradicted themselves in suggesting that loss of use is not covered.

Second, the Defendants-Respondents' proposed interpretation of "physical loss" as requiring "'distinct and demonstrable' damage" or contamination so severe as to render the property "completely useless or uninhabitable" is not only contradicted by the plain language of the policies, which expressly cover resulting *slowdowns* in Wawa's business just the same as they cover complete cessations in that business, but their interpretation also is contradicted by decades of precedent, including New Jersey precedent.

Third, the Defendant Insurers' contention is based on one section (§ 148.46) of Couch Third,[11] a controversial section that has been discredited and contradicted by another treatise and other writings by its primary author (and has never been adopted in New Jersey). That section has misstated the standard applicable to "physical loss or damage" for decades and, thus, has not accurately characterized what the pre-pandemic majority rule was, an argument insurers have never substantively refuted.

ARGUMENT

I. The Insurance Industry's Pre-Pandemic Understanding of the Term "Physical Loss Or Damage" Proves That Coverage Is Triggered by the Presence of COVID-19 on Insured Property

The insurance industry at-large understood, prior to the COVID-19 pandemic, that the presence of a virus (or any dangerous substance) satisfied their own understood meaning of "physical loss or damage" to property. This understanding is evidenced by: (i) more than 60 years of standard-form business income trigger language containing no requirement of any "physical" damage to or alteration of insured property prior to COVID; (ii) testimony from insurer corporate representatives admitting in a federal court deposition that a virus

[11] Steven Plitt, Daniel Maldonado, Joshua D. Rogers, & Jordan R. Plitt, Couch on Insurance 3d (1995 updated 2021) ("Couch Third").

can cause physical loss or damage to property;[12] (iii) insurers issuing policies with communicable disease coverage, defining the peril as "physical loss or damage resulting from . . . communicable disease and the associated business interruption as defined in the policy;" (iv) insurers' pre-pandemic questions posed to regulators regarding virus exclusions; (v) insurers' pre-pandemic marketing and instructional materials; and (vi) internal e-mails produced during litigation at the beginning of the pandemic acknowledging that a loss in functionality satisfies the "physical loss or damage" trigger. This was also the understanding of policyholders, who reasonably expected that their COVID-19-related business-interruption claims would be covered.[13]

Post-pandemic, insurers have pivoted and argued instead, through lawyer-crafted pleadings and briefs (which, as explained, are contradicted by pre-pandemic *evidence* and sworn insurer testimony), that a loss of use or function due to the presence of a dangerous substance does not satisfy this

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[12] See, e.g., Cinemark Holdings, Inc. v. Factory Mut. Ins. Co., 2021 U.S. Dist. LEXIS 140292 (E.D. Tex. July 28, 2021).

[13] Indeed, to give credence to the Defendants-Respondents' argument that complete uselessness or total dispossession is required to demonstrate "physical loss" would eliminate any potential for coverage for a slowdown in Wawa's operations as a consequence of "physical loss." Wawa paid a substantial $3.7 million premium for this broad, best-in-class coverage and reasonably expected – because the policies explicitly say so – that a slowdown in its business would be covered for both operative triggers – "physical loss" and "physical damage." Nothing in the policies negates this plain language or Wawa's reasonable expectation.

language or that a virus can never cause physical loss or damage. Evidence of the insurance industry's pre-pandemic positions, at the very least, demonstrates the ambiguity and requires this Court to construe the insurance policies in favor of the insured and against Zurich who drafted them.

A. The Insurance Industry's Standard-Form Business Income Trigger Language Contained No Requirement that Property Suffer Tangible Damage or Alteration for 60 Years Prior To COVID

Property and casualty insurers have, for almost 60 years, sold standard-form property insurance policies containing coverage triggered by direct "physical loss" or "physical damage." The first U.S. forms providing Business Income coverage were "Use and Occupancy" forms, which were triggered by "damage" to or "destruction" of property.[14] This limited trigger was a function of the specified peril covered by these policies – fire – which inexorably causes "damage" or "destruction."[15] In the middle of the last century, Use and Occupancy coverage was increasingly triggered by damage or destruction by additional named perils,

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[14] See, e.g., Brecher Furniture Co. v. Firemen's Ins. Co. of Newark, N.J., 191 N.W. 912, 912 (Minn. 1923) (noting that Use and Occupancy policy was triggered when building was "destroyed or damaged" by fire); Chatfield v. Aetna Ins. Co., 71 A.D. 164, 165 (1st Dep't 1902) ("It is a condition of this contract that if said building, or any part thereof, shall be destroyed or so damaged by fire . . . ." (citation omitted)).

[15] See, e.g., Fidelity-Phenix Fire Ins. Co. of N.Y. v. Benedict Coal Corp., 64 F.2d 347, 349-50 (4th Cir. 1933); Grand Pac. Hotel Co. v. Mich. Com. Ins. Co., 90 N.E. 244, 244-45 (Ill. 1909).

including "lightning, strikers, riot, explosion, falling aircraft, (including part, parts or cargo thereof) collapse, earthquake, water or the elements . . . ."[16] Again, given that these named perils all wreak "damage" or "destruction," there was no need to employ a broader Business Income trigger.

In the 1960s and 1970s, however, insurance companies began to add Business Income coverage to "all risks" forms[17] which, unlike the specified and named peril Use and Occupancy policies, cover loss from *all* fortuitous causes unless expressly excluded.[18] As a general matter, because the insurance industry expanded coverage beyond certain named perils to all risks, it also had to expand the Business Income trigger from "damage" or "destruction" of property to "loss" or "damage" to property,[19] so as to address all the ways a risk might affect property, beyond those traditionally considered to be "damage" or "destruction."

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16 See, e.g., Nat'l Children's Expositions Corp. v. Anchor Ins. Co., 279 F.2d 428, 429 n.1 (2d Cir. 1960).

17 See, e.g., Datatab, Inc. v. St. Paul Fire & Marine Ins. Co., 347 F. Supp. 36, 37 (S.D.N.Y. 1972); Burdett Oxygen Co. of Cleveland, Inc. v. Emps. Surplus Lines Ins. Co., 419 F.2d 247, 249 (6th Cir. 1969).

18 See Parks Real Est. Purchasing Grp. v. St. Paul Fire & Marine Ins. Co., 472 F.3d 33, 41 (2d Cir. 2006) ("Commercial property insurance generally is offered in the form of either an 'all risk' policy or a 'named perils' policy. Under an all-risk policy, 'losses caused by *any* fortuitous peril not specifically excluded under the policy will be covered.'. . . 'By contrast a "named perils" policy covers only losses suffered from an enumerated peril.'" (citations omitted)).

19 See, e.g., Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co., 227 N.W.2d 789, 792 (Minn. 1975).

In short, for almost 60 years, the insurance industry's standard forms have expressly covered Business Income from "loss" of property, and for this reason contained no requirement that property suffer tangible damage or alteration.

Throughout this period, in high-profile cases, courts gave a broad legal construction of those terms, finding they were triggered in contexts essentially identical to those here – including where property is infused or threatened with dangerous substances like asbestos, ammonia, smoke, bacteria, mold spores, or poisonous spiders – without requiring any "tangible" damage to or alteration of the property. Property insurance companies and their drafting organizations, including the Insurance Services Office, Inc. ("ISO"),[20] knew this because it was their business to know it: they monitored the legal construction courts gave the standard-form terms they chose for their policies, because this construction established the meaning of that language for millions of policies, and they negotiated changes to that standard-form language with regulators if they felt them necessary.

And, during this 60-year period, the insurance industry did negotiate *limited* changes. Notably, the insurance industry did not seek a *major* change: revising the broad trigger for Business Income coverage to require physical damage or

[20] Upon information an belief, certain Defendants-Respondents were, and are, members of ISO authorized in New Jersey to use certain ISO forms. Regardless, they use ISO-drafted standard-form terms in their policies.

alteration (or any other of the various, although simple, words of limitation the insurance industry now seeks to impose retroactively in the COVID-19 context). Instead, ISO took a very targeted approach, which was from the other direction. When ISO became concerned about claims for direct physical loss or damage from a particular substance under its broad trigger, it drafted "laser" focused exclusions for insurance companies to add to their policies to exclude loss or damage from that substance. In this way, the insurance industry developed exclusions for radiation, asbestos, silica, mold, bacteria, and, most important for this case, viruses. Although each of these substances may cause tangible damage or alteration to property, in many instances they may not. Yet insurers, through ISO, saw fit to exclude them wholesale.

Given that Defendants-Respondents use ISO forms and policy terms, and adopt ISO representations as to the meaning and effect of that language, ISO's statements to regulators are legally and factually the equivalent of statements by Defendants-Respondents.[21] That is why insurance trade organizations like ISO exist: to prepare, draft, and negotiate policy changes, *on behalf of their members and the insurance industry in general*, with the state regulators, *who represent*

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21 See Morton Int'l, Inc., 134 N.J. at 31-40.

consumers.[22] At the very least, ISO's statements to regulators demonstrate an ambiguity that must be construed in favor of the insured and coverage.

B. Pre-Pandemic Questions to Regulators Demonstrate That Insurers Knew a Virus Could Trigger Coverage

Prior to the pandemic, the insurance industry understood that the omission of a "virus exclusion" would provide broader coverage for policyholders. In New York, for example, ISO sought on behalf of insurance-industry members regulatory approval to make its virus exclusion mandatory in property policies. The Strathmore Insurance Company (a/k/a GNY) ("Strathmore"), an insurer with a broad constituent of hospitality-industry policyholders like Wawa, however, asked regulators for an exemption from a requirement that their policies include a virus exclusion because it would reduce coverage. Strathmore asked regulators if it could omit the virus exclusion, making it "optional" rather than "mandatory," in order to offer their customers broader coverage.[23] In its memorandum to New York regulators, Strathmore acknowledged that coverage exists for "this type of loss

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22 Id.

23 See Strathmore's April 30, 2020 Explanatory Memorandum – Response to Objection 1 (Second Amended Complaint, Ex. B, Legal Sea Foods, LLC v. Strathmore Ins. Co., 523 F. Supp. 3d 147 (D. Mass. 2021) (No. 1:20-cv-10850-NMG)).

('pandemic')" in the absence of a virus exclusion.[24] It told regulators that viruses and pandemics could result in potential covered losses in "Business Interruption/Time Element coverage segments."[25] Strathmore gave specific examples of diseases spreading in indoor, highly trafficked spaces, like restaurants or doctors' offices, that may create a covered loss.[26] It also acknowledged that a "pandemic" loss from "contagious disease" could involve a wide variety of vectors, including losses "transmitted to third parties via ingestion," "direct contact to an insured's products," or "spread through a HVAC system" in a building.[27]

Crucially, Strathmore admitted what all property insurers knew: policyholders reasonably expect this coverage and would never willingly part with it. Strathmore said: "[W]e do not anticipate that any of our insured[s] will voluntarily request this [virus] exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is

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24 Id.

25 Id.

26 Id.

27 Id.

well within the realm of possible fortuitous occurrences and should be covered should such an event arise."[28]

Strathmore's objections to a mandatory virus exclusion show a pre-COVID understanding that a virus-caused pandemic would trigger Business Interruption Coverage.

C. Evidence Adduced in Other COVID-19 Litigations *Proves* That Insurers Knew a Virus Could Cause Physical Damage

"Years before the pandemic," FM Global Group ("FM"), one of the most sophisticated property insurers globally, "instructed claim adjusters and clients (policyholders) through policy workshop slide decks that 'physical damage' means an 'actual substantive change' that 'reduces worth or usefulness' of property or 'prevents [it] from being used as designed or intended.'"[29] "FM also knew that a virus could meet that meaning and that its broad all-risk/all-peril insurance products specifically included such damage."[30] "In fact, the company included 'communicable disease,' defined in FM's insurance policies as 'one that is transmissible from one person to another,' as one [of] many covered perils, defining the peril as 'physical loss or damage resulting from . .

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28 Id.

29 Id.

30 Id.

. communicable disease and the associated business interruption as defined in the policy.'"[31]

Moreover, "FM's corporate representative admitted in a federal court deposition that a virus can cause physical loss or damage to property."[32] FM Documents confirm :

- "These statements show FM knew, well before the pandemic, that a loss of functional use caused by the presence of a dangerous substance meets both the insurer's and the commonly understood meaning of 'physical damage.'"[33]
- "Even more, the fact that FM specifically defined both the types of diseases that its policies would cover and the peril to which the resulting loss would be assigned for internal coding reveals a level of knowledge and expectation that certain diseases and, necessarily, their causative virus or disease-causing agent, could trigger multiple coverages."[34]

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31 Id.

32 Id. (citing Cinemark Holdings, Inc. v. Factory Mut. Ins. Co., No. 4:21-CV-00011, 2021 U.S. Dist. LEXIS 140292 (E.D. Tex. July 28, 2021)).

33 Id.

34 Id.

These pre-pandemic views are directly at odds with the self-serving post-pandemic positions of insurers and demonstrates an alternative and more expansive understanding of coverage.

D. Internal Communications of Insurance Executives at the Start of the Pandemic Show an Understanding That Loss of Use or Functionality Because of Dangerous Conditions Satisfies the "Physical Loss or Damage" Trigger

The admissions are not confined to FM. Internal emails—not marked confidential—produced at the start of the pandemic during discovery in The Trustees of Purdue University v. American Home Assurance Co., No. 02D02-2108-PL-327 (Ind. Commercial Ct.), show American International Group, Inc. ("AIG"), perhaps the largest U.S. insurer, "understood that a loss in functionality satisfies the 'physical loss or damage trigger."[35] "Upon learning of the first business income lawsuit in March 2020, AIG's Head of Retail Property, North America General Insurance, stated in an email exchange with top AIG officers and executives [that it is a] 'very thorny question as to whether or not the threat or presence of COVID-19 contamination is considered physical damage.'"[36] AIG's Head of Property and Energy Claims responded to the group that he "'[a]greed' and then stated to the Head of Retail

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35 Greg Gotwald & Michael S. Levine, The Insurance Industry's COVID Sin, ALM Law.com, Dec. 14, 2022, https://www.law.com/insurance-coverage-law-center/2022/12/14/the-insurance-industrys-covid-sin/.

36 Id.

Property and the Chief Underwriting Officer of North America Property: 'It's well-accepted that physical damage or loss is a "material change" which "degrades" or "impairs the function of the property."'"[37] "The Retail Property Chief Underwriting Officer repeated this maxim to the Regional Property Underwriting Manager and the South Zone Property Executive: 'What is physical loss or damage — It's well-accepted that physical damage or loss is a "material change" which "degrades" or "impairs the function of the property."'"[38]

Similarly, internal communications from The Cincinnati Insurance Companies ("Cincinnati") Commercial Lines Product Director to its Vice President for Commercial Property on March 20, 2020, stated:

> Once someone who is a carrier [of COVID-19] is on premises, then I think, and Tore [Swanson, Cincinnati's Assistance Vice President and Property Claims Manager] agreed, that constitutes some type of property damage and Tore thought we would at least pay for clean-up/disinfectant costs (e.g., a student is diagnosed with the disease and we pay to disinfect the dorm room).[39]

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37 Id.

38 Id.

39 Id. (citing internal communications from The Insurance Companies used in the K.C. Hopps, Ltd. v. The Cincinnati Ins. Co., No. 20-cv-00437-SRB, 2021 U.S. Dist. LEXIS 203904 (W.D. Mo. Oct. 22, 2021)).

This admission shows that Cincinnati believed the presence of the virus on the property constitutes damage triggering coverage and is yet another example of insurance-industry knowledge that coverage should be triggered in this case.

Insurers, including Defendants-Respondents, knew the state of the law when the pandemic started and recognized, both before and after the pandemic began, that the presence of the virus satisfies their own understood meaning of "physical loss or damage," as well as the reasonable expectations of their insureds. The insurance industry's own understood meaning of "physical loss or damage"[40] clearly demonstrates, at the very least, an ambiguity that must be construed in favor of the insured and coverage.

II. Section 148.46 of *Couch Third* Is in Error, and Reliance on It Misplaced.

Insurer Defendants-Respondents' contention that Wawa's property must suffer some "distinct, demonstrable, physical alteration" derives from one section in one treatise, Couch Third § 148:46.[41] The Couch Third formulation is contradicted by:

- 60 years of precedent existing before Couch Third first introduced this formulation in 1995;

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[40] Certain Defendants-Respondents' Br. at 35-36.

[41] 10A Couch Third § 148:46. This formulation does not appear in Couch First or Couch Second.

- Almost three decades of precedent since Couch Third first stated that formulation in the mid-1990s; and
- A treatise and not one, but two, articles by the lead Couch Third author, published nearly two decades after he endorsed the formulation created in Couch Third, and applying a different (and correct) standard of law to the terms "physical loss or damage."

In 1995, Couch Third added a new section, § 148:46, titled "Generally; 'Physical' loss or damage." Purportedly based on a dictionary definition of "physical," it stated a new formulation it called a "widely held" "requirement" — that the policyholder must show "a distinct, demonstrable, physical alteration of the property."[42] However, in doing so, it ignored the case law and property-insurance drafting history above; to be clear, no case prior to 1995 said this. This section's reliance on **one federal case** predicting Oregon law, Ben Franklin, is infirm.[43] The Oregon state appellate court – more an arbiter of Oregon law than a federal judge ostensibly bound to follow Oregon law under the Erie Doctrine [44] – rejected Ben Franklin three years later in

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42 Id.

43 Id. n.6 (citing Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 793 F. Supp. 259 (D. Or. 1990), aff'd, 953 F.2d 1387 (9th Cir. 1992) ("Ben Franklin")).

44 See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Erie").

Trutanich,[45] a case decided two years prior to publication of Couch Third, which fails to mention it.

Couch Third acknowledged that courts had read "physical loss or damage" not to require "physical alteration,"[46] but suggests that this standard is the minority rule.[47] That was wrong when Couch Third first was published – and it is wrong today. Rather, the rule adopted at the time (mid-1990's) by at least 13 courts was, and is, the majority rule.[48] This acknowledgement, however, concedes ambiguity.

Updates of this section since 1995 generally have added cases that side with insurers or cite Couch Third's erroneous formulation,[49] not cases that rely

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45 Farmers Ins. Co. v. Trutanich, 858 P.2d 1332, 1335 n.4 (Or. Ct. App. 1993) ("Trutanich") (rejecting Ben Franklin, 793 F. Supp. at 263).

46 10A Couch Third § 148:46 n.7.

47 Notably, courts have interpreted "physical loss or damage" in multiple ways – something Couch Third expressly acknowledges, showing the term is ambiguous. See, e.g., NAV-ITS, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110, 119 (2005).

48 As of 1995 when Couch Third first was published, there were 250 time-element cases, total, on the books. Richard P. Lewis & Nicholas M. Insua, Business Income Insurance Disputes (2d ed. 2020 & Supp. 2022) (Table of Cases). This erroneous standard has continued to be repeated in the updates of Couch Third up through the November 2022 update of the treatise. Given this manageable number of cases, it is then all the more surprising to see this error continue for almost three decades in a treatise touted as comprehensive.

49 Including: Torgerson Props., Inc. v. Cont'l Cas. Co., 38 F.4th 4 (8th Cir. 2022); Dukes Clothing, LLC v. Cincinnati Ins. Co., 35 F.4th 1322 (11th Cir. 2022); Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am., 35 F.4th 1318 (11th Cir. 2022); United Talent Agency v. Vigilant Ins. Co., 77 Cal. App. 5th 821 (2022); Verveine Corp. v. Strathmore Ins. Co., 184 N.E.3d 1266 (Mass.

on the majority view supporting coverage for loss of use. The Couch Third November 2022 update still cites Western Fire to support the latter, majority, view.[50] The November 2022 update continues to cite Ben Franklin as one of the cases supporting § 148:46's overstated "distinct, demonstrable, physical alteration" formulation, without noting that the Oregon Court of Appeals rejected it.[51] The current version (November 2022) of § 148.46 also ignores the numerous decisions supporting coverage for such claims.[52]

The lead author of Couch Third, Steven Plitt, contradicted the formulation stated in § 148.46 in two 2013 articles and another treatise. The title of one of the articles makes the point plain: Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical

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2022); Los Angeles Lakers, Inc. v. Fed. Ins. Co., No. CV 21-02281 TJH (MRWx), 2022 WL 831549 (C.D. Cal. Mar. 17, 2022); Dakota Girls, LLC v. Phila. Indem. Ins. Co., 524 F. Supp. 3d 762 (S.D. Ohio), aff'd, 17 F.4th 645 (6th Cir. 2021); Rankin v. USAA Cas. Ins. Co., 271 F. Supp. 3d 1218 (D. Colo. 2017); In re Chinese Manufactured Drywall Prod. Liab. Litig., 759 F. Supp. 2d 822 (E.D. La. 2010); Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co., 17 F. Supp. 3d 323 (S.D.N.Y. 2014); MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co., 115 Cal. Rptr. 3d 27 (2010).

[50] 10A Couch Third § 148:46 n.7 (citing W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52 (Colo. 1968), and failing to acknowledge the many other cases from the 1950s forward upholding coverage).

[51] Trutanich, 858 P.2d at 1335 n.4 (disregarding Ben Franklin). Under Erie, this state appellate decision governs over a federal court's "Erie guess."

[52] See Richard P. Lewis, Lorelie S. Masters, Scott D. Greenspan, & Chris Kozak, Couch's Physical Alteration Fallacy: Its Origin and Consequences, 56 Tort, Trial & Ins. Prac. L. J. 621, 636 (2021).

Damage, Alteration.[53] Discussing then-recent case law, Mr. Plitt concluded that "courts are not looking for physical alteration, but for loss of use."[54] A few months later, Mr. Plitt reiterated in another article, "[i]t is well recognized by courts that physical loss exists without destruction to tangible property" such as "serious impairment of a building's function" which "may render the property useless."[55] Finally, Mr. Plitt co-writes another treatise whose November 2021 update concludes, slightly more equivocally but still contrary to Couch Third § 148.46: "[i]t is difficult to distill a general rule" from the relevant cases.[56]

Couch Third's formulation also conflicts with other major insurance treatises. Insurance Claims & Disputes states: "[W]hen an insurance policy refers to physical loss of or damage to property, the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be

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53 Steven Plitt, Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration, Claims J., Apr. 15, 2013, https://amp.claimsjournal.com/magazines/ideaexchange/2013/04/15/226666.htm ("Modern Trend").

54 Id.

55 Steven Plitt, All-Risk Coverage for Stigma Claims Involving Real Property, 35 Ins. Litig. Rep., No. 9, 2013 ("Stigma Claims").

56 John K. DiMugno, Steven Plitt, & Dennis J. Wall, Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters § 8:6 (2014 updated Nov. 2021) (citations omitted).

present without there having been a physical alteration of the object."[57] Appleman's Insurance Law and Practice[58] concludes that "[t]he courts have construed the scope of what constitutes 'physical loss or damage' liberally," while still recognizing that some losses (such as a withdrawn warranty) are not "physical."[59] The 2022 update to another treatise reaches the same conclusion. It summarized the law, concluding that such disputes "generally have been resolved in favor of coverage."[60]

Despite this consistency in other treatises, courts rejecting coverage for COVID-19 have repeatedly adopted Couch Third's erroneous formulation, or cited decisions by courts citing it, or simply stated the erroneous formulation itself as if it were a common understanding. Such decisions have multiplied the error stated in § 148.46. We submit that it is simply not possible to square the 200 decisions reflexively adopting Mr. Plitt's 1995 "widely held" rule in § 148:46 with his views stated, without equivocation, in his Modern Trend and

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57 3 Allan D. Windt, Insurance Claims & Disputes § 11:41 (6th ed. 2013, updated 2021). Windt cites cases Couch Third ignores.

58 5f-142f John Alan Appleman & Jean Appleman, Insurance Law and Practice 2d § 3092 (1970 & 2012 Supp.).

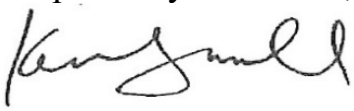
59 Id. That treatise was discontinued in 2012 and proceeded as New Appleman on Insurance. Jeffrey E. Thomas & John Allan Appleman, New Appleman on Insurance, Law Library Edition (2013).

60 Peter J. Kalis, Thomas M. Reiter, James R. Segerdahl, & Lucas J. Tanglen, Policyholder's Guide to the Law of Insurance Coverage § 13.04 (2012 & Supp. 2022).

Stigma Claims articles and Catastrophe Claims treatise. The fact remains, however, that the Couch Third formulation is wrong, and at the least shows that the insurers' policy language is ambiguous.

Dated: February 28, 2023

Respectfully submitted,



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